

Neoliberalism and Access to Justice – Some Preliminary Findings

Introduction

This paper sets out some preliminary findings which will form part of my PhD thesis on the broad topic of the impact of neoliberalism on access to justice. I am conducting empirical research in order to identify and examine trends in summary justice which appear to have been influenced by neoliberal political ideology, and consider how those trends may have affected the ability of those charged with criminal offences to access the information which will enable them to participate effectively in the proceedings.

The observations from which these findings emanate form part of a broader concern about the impact of changes to access to publicly funded representation in summary criminal proceedings, set within a broader context of politically driven concerns about criminal case progression in an era that requires austerity and efficiency in publicly funded institutions. The research draws heavily on the findings of earlier socio-legal studies of summary justice, most notably Carlen (1976), Bottoms and McClean (1976), McBarnett (1981), Sanders (2002), Morgan (2000) and Darbyshire (1997)

The issue that I will discuss today – how law is used in magistrates' courts, is only one of many issues that have arisen following observation of magistrates' court proceedings in late 2012 and early 2013. Other important matters that remain, for today's purposes, part of the background, include levels of and funding for legal representation, the well documented differences between how magistrates and District Judges process cases and the use of forms as a manifestation of bureaucratic decision making processes. It is important to keep these issues in mind as it would be extremely difficult to isolate causal influences that have an impact on summary criminal proceedings.

Methodology

The empirical research thus begins from the premise that it is important to understand the way in which summary justice is presently administered, and it was against this background that observation was performed. The equivalent of twenty days observation was conducted at four magistrates' courts in Kent – five days at each court. A total of 184 cases were observed, ranging from applications for arrest warrants, case seizures, administrative hearings, pleas, trials and sentencing. The aims of the observation were:

1. To identify levels of legal representation
2. To identify how representation was funded
3. To identify differences (if any) in case handling and outcome between represented and unrepresented defendants
4. To identify patterns of behaviour (if any) which tended to ostracise defendants (whether represented or not) so that they remain only ‘dummy players’ (Carlen, 1976) in the proceedings.

It is the fourth of these aims to which these findings refer. The observation findings will be used to develop semi-structured interviews with both prosecution and defence advocates.

An issue that is of methodological importance to my work is my role within the institutions that I observed. I am a practising criminal defence advocate. I have been a criminal defence solicitor for seven years and have worked in the criminal justice system since 2002. I regularly appear in the courts that I was observing and was easily identifiable by members of the Bench, court legal advisors and advocates, all of whom showed some degree of interest in my presence as a court observer. This placed me in the role of “participant – as – observer” (Bryman, 2008; 410), which has three wider-reaching implications for my research:

1. The implications on my ability to conduct impartial and thorough observations in an area with which I am so familiar
2. Whether I will be able to identify issues which are significant but seem mundane to someone familiar with the setting
3. Whether I was able to identify nuanced behaviour which may not be obvious to a lay observer.

So far as the first point is concerned, Bryman notes “The researcher’s prolonged immersion in a social setting would seem to make him or her better equipped to see as others see... also, he or she participates in many of the same kinds of activity as the members of the social setting being studied” (2008; 465). While the concern that my immersion in the environment may lead me to take significant behaviours for granted is noted, that immersion carries with it certain other benefits which could alter the understanding of the topic concerned.

The most relevant issue here relates to “learning the native language...it is also very often the ‘argot’ – the special uses of words and slang that are important to penetrate that culture”

(Bryman, 2008; 465). Further, while the presence of a participant observer can result in reactive effects, several advocates (both prosecuting and defending) commented that, although my presence as observer was unusual, they did not pay a lot of attention to what I was doing because I was already an 'insider' or 'on their team'. One prosecutor commented that, when an unknown observer is present, they must be on their 'best behaviour' – a formality which seemed to be unnecessary with me. This point does, however, have to be balanced against the risk of over-identification with the research subjects. Indeed, the fact that I was able to identify poor practices that I myself have participated in (such as basically ignoring defendants in the dock to chat with other advocates while magistrates were in retirement) enabled me to retain a degree of reflexivity about what I was observing.

By far the greatest advantage that my practitioner-researcher/participant-observer role gave me was my location in the same epistemic community as my subjects. This stance is what has enabled me to identify and analyse how law is used in summary proceedings. I suggest that points of law arise much more frequently in magistrates' courts than has previously been estimated, and I am able to make this argument specifically because I am familiar with the language of the court and provisions to which implicit reference is often made.

This section considers how points of law manifest themselves in the four magistrates' courts studied. It considers the ways in which law is referred to in summary proceedings and situates the construction of legal issues in contemporary trends in criminal justice.

Socio-legal scholars have regarded magistrates' courts as venues in which proceedings are processed quickly, with minimal due process protections, and give the impression that those advocates who refer to points of law are dismissed as inexperienced and/or time wasting (Carlen, 1976; Bottoms and McClean, 1976; McBarnett, 1981). This theme appears to persist in summary criminal proceedings, as, according to Darbyshire (2011), lawyers who raise so-called spurious legal issues are still regarded as a threat to what Carlen (1976) referred to as the uncomfortable compromise which typifies the working relationships that exist between professional court personnel. As a result, one gains the impression that points of law are seldom referred to or, alternatively, that when legal issues are raised, they are treated as an inconvenience; as something which delays the volume processing of cases because legal ideology has been subordinated to bureaucratic requirements (McBarnett, 1981). As recently as 2011, Darbyshire (2011) reported that District Judges took the view that legal argument should not be raised in

magistrates' courts, because the magistrates' court is the place of common sense, describing it as a "law free zone" (Darbyshire, 2011; 171). Notably, when Carlen (1976), McBarnett (1981) and Bottoms and McClean (1976) conducted their studies, defendants tended to appear without the assistance of a solicitor and the police, rather than qualified lawyers, were the prosecutors. The Crown Prosecution Service took over state led prosecutions in 1986 and, by 1986/87, four-fifths of defendants appearing in magistrates' courts were legally represented (Legal Action Group, 1992). Kemp (2010) noted that 82% of defendants in her magistrates' court sample were legally represented, nearly all via public funding.

It is possible that the two above-mentioned factors (although isolating causes is likely to be difficult) have led to increased reference to legal provisions in summary proceedings. Indeed, Darbyshire (2011) reported the dismay expressed by one District Judge that more people were attempting to raise legal arguments in magistrates' courts. My observations suggest that there are frequent references to particular points of law during the course of summary proceedings in both implied and explicit terms. Particular points of law are most likely to be referred to during the course of sentencing proceedings. Furthermore, the provisions of the Bail Act 1976 are often implicitly referred to, while both implied and explicit reference to the construction of charges and required evidence are also relatively common in the course of case management. As Darbyshire (2011) acknowledges, the fact that legal argument is unusual does not mean that the law is not applied in summary proceedings, but that it is often applied in routinised ways. The implication of this is that it at least perpetuates, if not exacerbates, practices which exclude defendants from active participation in the proceedings. I hope to demonstrate this by reference to 3 instances in which implicit references to law appear to have a significant role in summary proceedings – sentencing guidelines, bail and case management hearings.

Sentencing Guidelines

Providing sentencing guidelines to magistrates is an example of measures designed to combat inconsistent decision making practices (Darbyshire, 1997; Davies, 2005). There is arguably a convergence of law and bureaucracy here, which there is not time to develop at this stage. The Sentencing Council states:

"It is important to ensure that courts across England and Wales are consistent in their approach to sentencing. Sentencing guidelines, which set out a decision-making process for all judges and magistrates to follow, play an essential role in this" (Sentencing Council, 2012).

The sentencing guidelines are based on statute, case law and policy documents, and are therefore based on particular legal provisions according to precedent. Thus, while the guidelines are not strictly points of law, they represent a distillation of legal opinion about the severity of offences. According to the Coroners and Justice Act 2009, the use of sentencing guidelines is mandatory unless it is not in the interests of justice to follow a particular guideline. Therefore, in order to determine the most appropriate sentence in any case, a working knowledge of the guidelines is advantageous – either to highlight specific aggravating and/or mitigating features or to argue that it would not be in the interests of justice to apply a particular guideline. Of the thirty-seven references that I found to the sentencing guidelines, seventeen of those references were implicit – for example, stating that a theft was opportunistic or an assault was unprovoked, which are matters specifically recorded as mitigating features (Sentencing Council, 2012).

Sentencing guidelines in their present form did not exist until 2003, when the Sentencing Guidelines Council was created under the Criminal Justice Act 2003. The Sentencing Guidelines Council became the Sentencing Council in 2010. As that agency notes, “Guidelines are a relatively new innovation in sentencing so there aren’t guidelines for every offence yet, and where they don’t exist, judges look at previous similar cases for guidance on appropriate sentencing levels” (Sentencing Council, 2012). The sentencing guidelines therefore represent a coordinated effort to ensure more consistency and thereby appear to introduce a greater degree of specialised legal knowledge into summary proceedings than has previously been noted.

Bail

At first glance, matters concerning bail might appear to be a matter of mere formality. However, the fact of being placed on bail, with or without conditions, allows any criminal court to prosecute an individual who fails to attend Court while subject to bail under s.6 Bail Act 1976. Therefore, every time a defendant is released on bail, at whatever stage in proceedings, he or she is effectively put on notice that there will be further charges if s/he fails to attend court as directed. The provisions of the Bail Act 1976 state that bail may be refused or bail with conditions may be imposed to ensure attendance at court, to ensure the defendant does not commit an offence while on bail or to ensure that the course of justice is not obstructed. Those exceptions to the right to (unconditional) bail appear to be referred to in implicit terms when prosecutors make applications to remand defendants into custody and when defence advocates apply for bail to be granted with conditions, as any conditions that are suggested are designed to meet concerns about the exceptions to the right to bail.

Furthermore, provisions of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 which came into force on 3 December 2012 now state that the prosecutor can only apply for a remand into custody if there is a realistic prospect of a custodial sentence on conviction, with certain limited exceptions such as proceedings relating to domestic violence. Not only does this suggest that knowledge of sentencing guidelines is advantageous, but also my observations suggest that it is now not uncommon to hear prosecutors address the court simply by stating that there is or is not a realistic prospect of custody in applications for remand into custody or on bail. This is an implicit reference to provisions, the significance of which may not be understood by a 'lay' person. It should also be noted that particular provisions state that the decision to grant bail based on the fact that a custodial sentence is not a realistic sentencing option does not affect the power of the sentencing court to ultimately impose a custodial sentence. Again, these are matters that appear to post date earlier socio-legal studies of magistrates' courts proceedings, and are particular legal provisions, of which knowledge is advantageous in framing submissions to the magistrates. The implicit use of legal provisions is therefore significant in summary proceedings, and could result in misunderstanding to the untrained ear. The implicit use of those terms highlights, and perhaps more recently exacerbates, the paradox of summary justice in that it requires knowledge of procedural propriety but denies access to that knowledge by the unexplained use of jargon and signaling (Carlen, 1976).

Case Management

Case management hearings have evolved from Narey's suggestion in 1997 that pre trial review hearings may alleviate the volume of ineffective trial listings that occurred in magistrates' courts. Auld, in 2001, became concerned about the number of Pre Trial Reviews that occurred and believed that the parties should take a more co-operative approach to case management. In 2005, the Criminal Justice: Simple Speedy Summary initiative (which sought to reduce delay in summary proceedings) proposed the abandonment of pre trial reviews in favour of more proactive case management outside the court. However, case management hearings remain in place in Kent.

Case Management forms have both administrative and legal roles in magistrates' court processes. Case Management forms require the parties to state the matters that are in dispute, the witness requirements (and reasons why witnesses are required), any further evidence to be served and any legal argument that is envisaged. As such, they require the parties to narrow the contested issues at trial so that court time can be used in the most efficient manner. The forms are also used to prevent the Crown being 'ambushed' at trial, which has the effect of focusing the Crown

Prosecutor's time and resources only on those matters that are disputed (*DPP –v- Chorley Justices and Andrew Forrest* [2006] EWHC 1795; *Malcolm-v- DPP* (2007) EWHC 363 (Admin)).

Case management forms are part of the executive's desire to increase efficiency under the Criminal Procedure Rules and therefore have an administrative function. Case management forms do also, however, have a role in potential legal argument about how evidential burdens are discharged and whether it would be just for trials to proceed. The form requires a defence advocate (the wording of the form assumes that the defendant has received advice) to indicate that a defendant has been advised that a trial can proceed in his or her absence if the defendant fails to attend Court as directed (See *R (on the application of Drinkwater) –v- Solihull Magistrates' Court* [2012] EWHC 765 (Admin), *R –v- Jones* [2002] UKHL 5), which is relevant to whether proceedings should continue in the absence of a defendant and whether a charge of failing to attend Court as directed can be laid.

Furthermore, the answers provided on Case Management forms can be used as evidence during the course of a trial, as an implied admission to particular elements constituting an offence, such as presence at the scene. This practice is however discouraged (*R –v- Newell* [2012] EWCA Crim 650).

The completion of Case Management forms represents a convergence of law and bureaucratic measures designed to ensure consistency and efficiency, as questions are reduced to a series of tick box answers – such as a yes/no answer as to whether the defendant has been advised about credit for entering an early guilty plea - with limited space to explain the issues. There is a specific section of the Case Management form which asks whether the parties can agree a basis of plea or plea to an alternative charge. Thus the form becomes a way of demonstrating that the parties are acting in an efficient, co-operative manner, as well as a document which, in order to be completed appropriately, requires knowledge of both the nature of the charge and the evidential burdens which the Crown must satisfy to prove its case.

Concluding Remarks

It seems therefore that points of law arise more frequently in summary proceedings than has previously been observed. This could result from a number of factors, and causal links may be

impossible to isolate. The most relevant factors appear to be increased levels of representation (Legal Action Group, 1992), a desire for magistrates' courts to retain work (Darbyshire, 1997), the removal of low level, uncontested offending from the magistrates' courts via the increased use of fixed penalty notices/cautions (Morgan, 2010) and a welter of new offences and legislation relating to the criminal justice process (Baillie, 2011; Ashworth and Zedner, 2008).

There has been a desire for magistrates' courts to retain cases rather than send them to the Crown Court since the late 1990s (Darbyshire, 1997). So, while Darbyshire (2011) asserts that lawyers who wish to raise legal argument will, where possible, try to have the case dealt with in the Crown Court, there are bureaucratic measures which seek to deter committal to the Crown Court - not least the removal of committal fees and reduced guilty plea fees for advocates (Legal Services Commission, 2011). This desire has resulted from the government's hope to accelerate the processing of criminal cases as magistrates' courts tend to deal with cases more quickly than Crown Courts. Sanders (2010), and Ashworth and Zedner (2008), note that a significant number of new offences created in the last two or three decades are strict liability matters, which are usually confined to summary only proceedings and are easier to prove than those offences requiring *mens rea*.

Case complexity has increased (Cape and Moorhead, 2005), which may have been as a result of a flurry of relevant legislation or of the removal of unchallenged minor offences from magistrates' courts. The removal of low level offending from magistrates' courts via diversionary processes was also designed to increase efficiency in the criminal justice process, as were co-operative practices encouraged by the Criminal Procedure Rules (from which case management hearings are derived) (Auld, 2001). Not only do those co-operative practices discourage defendant's participation in the proceedings (Carlen, 1976), they encourage the parties to focus more on the legal and evidential issue involved in trials. This has the effect of prompting disagreement about what is necessary to pursue a prosecution (Welsh, 2010), thereby encouraging dispute in relation to points of law, particularly when a defendant is legally represented. Alternatively, this might be evidence of lawyer's attempts to increase fees received by contesting spurious issues - this is the supplier-induced demand theory, which has been much criticised. See for example, Cape and Moorhead (2005), although the provisions of the Criminal Procedure Rules, and other government led efficiency drives, such as Stop Delaying Justice! are designed to prevent such practices. My observations suggest that of the forty hearings in which defendants were unrepresented, eleven included references to points of law. There were 143 hearings in which defendants were legally represented, which included 105 references (either explicit or implicit) to

points of law (there may have been more than one reference per case). Furthermore, the routine provision of case papers has enabled cases to be analysed in greater detail at an early stage in proceedings (Cape and Moorhead, 2005). Therefore, somewhat ironically, measures designed to speed up the process of summary justice may have also encouraged more explicit references to points of law. Given that most defendants are legally represented – only 40 of the 184 defendants I observed were not legally represented - it is arguable that those issues would be less likely to arise if defendants were unrepresented, which may, in turn, further increase the pace of proceedings. However, evidence suggests that the presence of lawyers actually increase efficiency by negotiating pleas (Mulcahy, 1994) and co-operating with proceedings (Goriely, 1996).

It seems therefore that either the frequency with which points of law arise in summary proceedings has either been previously underestimated or, perhaps more likely, that levels of representation, alongside procedures designed to direct more serious cases to important issues of dispute and new legislation have increased references to points of law in summary proceedings.